No. 73-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

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In their answering briefs,[1] appellees suggest for the first time that the present controversy is "academic" (see p. 2, below); and, alternatively, they object to this Court's jurisdiction to review the merits of the lower court's decision. As we show below, both objections are without foundation and this Court presumably rejected the objection to its jurisdiction months ago. In any event, if this case were moot or this Court

[1] This reply is directed to the answering briefs filed by SCRAP and EDF, *et al.* ("SCRAP-EDF"); ISIS ("ISIS"); and NARI, *et al.* ("NARI").

did lack jurisdiction, the consequence would not be affirmance of the judgment below or dismissal—as appellees assume—but rather an order by this Court vacating the judgment below and remanding with instructions.

There is in fact a major jurisdictional issue at the threshold of this case, but it concerns the jurisdiction of the District Court rather than this tribunal. As the railroads showed in their opening brief, the District Court lacked jurisdiction to review general revenue orders, particularly where (as here) the challenge is fundamentally directed at rates on particular commodities rather than the railroads' general revenue needs. Appellees have no persuasive answer to this jurisdictional objection.

Finally, on the merits, appellees' attacks on the Commission's lengthy and detailed environmental impact statement do not justify the District Court's decision. On the contrary, they merely confirm that, if the sweeping and untempered judicial review of impact statements utilized by the District Court is sustained, virtually no impact statement could be found sufficient. Here, the adequacy of the present impact statement is confirmed by appellees' own repeated reliance on subsequent ICC impact statements which reached the same ultimate conclusion as the impact statement sought to be condemned.

I. APPELLEES' CLAIMS THAT THE CASE IS MOOT OR THAT THE DISTRICT COURT ORDER IS NOT APPEALABLE ARE WITHOUT MERIT AND DO NOT, IN ANY EVENT, WARRANT AFFIRMANCE OR DISMISSAL OF THE APPEAL.

1. Throughout SCRAP-EDF's brief, there is a recurring *leitmotiv* that the effect of the District Court's decision is "academic" (SCRAP-EDF Br. 4), "nil"

(*id.* 5), "inconsequential" (*id.* 27), or "moot" (*id.* 78) in some nontechnical sense.[2] Although the railroads believe the Court may decide this case without reaching the merits—by disposing of it on the jurisdictional grounds which the railroads have pressed in their opening brief—there is no merit to the appellees' contention that the District Court decision was or is now in any sense hypothetical or academic.[3] In fact, that decision ordered the reopening of *Ex Parte No. 281* for further proceedings and gave detailed instructions to the Commission as to the preparation and contents of a new impact statement upon remand. The District Court ordered the Commission to "prepare another

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[2] SCRAP-EDF claim that "[w]hile this case may not be moot in the technical sense, its connection with the real world is tenuous, and likely to become more so." SCRAP-EDF Br. 78. It is unclear whether ISIS, which incorporates by reference several of the comments made in the SCRAP-EDF brief (see ISIS Br. 3), joins SCRAP-EDF in making this suggestion.

[3] This is the third time in the course of this litigation that one or more of the appellees have suggested that a railroad appeal to this Court should be dismissed as moot. In the fall of 1972, SCRAP urged that the railroads' appeal be dismissed as moot when the railroads appealed from the lower court's original injunction directed against the interim emergency surcharge as applied to recyclable commodities. See SCRAP's "suggestion of mootness" contained at pp. 12-15 in SCRAP's motion to dismiss or affirm, December 1972. This Court, of course, rejected the suggestion of mootness, noted probable jurisdiction and thereafter reversed the lower court's injunction. *United States* v. *SCRAP*, 412 U.S. 669 (1973). Again, in the fall of 1973 in their motions to dismiss the railroads' appeal from the District Court's preliminary injunction issued in June 1973, the appellees argued that the appeal was moot. See motions to dismiss submitted by SCRAP, EDF, ISIS, NASMI, *et al.*, September and October 1973. This Court again rejected appellees' arguments and instead vacated the District Court's injunction and remanded for further consideration in light of *Atchison T. & S. F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973). 414 U.S. 1035 (1973).

draft statement to be circulated as specified by Section 102(2)(C) [of NEPA]" (371 F. Supp. 1306 (Gov. J.S. 39a)); it stated that the "new statement must include an analysis of the underlying rate structure's impact on the movement of recyclable commodities" (*id.*), as well as "an analysis of the effects of the rate structure on investment in manufacturing facilities which can make intensive use of scrap" (*id.* (Gov. J.S. 40a)); it noted that "[a] comprehensive study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete will . . . probably be necessary" (*id.* (Gov. J.S. 41a)); and it ordered the preparation of a new final statement. *Id.*

While the claim of mootness thus appears to be frivolous, it would not, even if accepted, warrant the relief sought by appellees—affirmance or dismissal of the appeal. When a case becomes moot on appeal from a judgment of a lower court, then "the established practice of the Court . . . is to reverse or vacate" the judgment below. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). As the Court explained in that case, citing numerous supporting precedents:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co.* v. *Greenwood County,* 299 U.S. 259, 267, to be 'the duty of the appellate court.' That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happen-

> stance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." 340 U.S. at 39-40 (footnote omitted).

This rule is based on elementary fairness since a litigant cannot properly be subject to the effects of a judgment and yet be deprived of its statutory right to obtain appellate review.

In short, if this case were deemed moot by the Court, then the only appropriate course would be to vacate the District Court's judgment with instructions to dismiss. If the present controversy were academic or moot, the ICC should clearly not remain subject to an outstanding obligation to prepare a new impact statement in this proceeding, as it would be if this Court affirmed the lower court's judgment.

2. Appellees renew the same objections to this Court's jurisdiction that they previously raised in their motions to dismiss. The railroads' reply to appellees' motions demonstrated the lack of merit in these objections. R. R. Reply 1-15. The railroads believe that this Court has already rejected appellees' arguments by noting probable jurisdiction in this appeal. Thus, if the Court had harbored any doubts regarding its own jurisdiction, it would instead have postponed jurisdiction to the merits.[4] Nevertheless, for the convenience of the Court, the railroads will

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[4] See, *e.g.*, *Cramp* v. *Board of Public Instruction*, 366 U.S. 934 (1961); *United States* v. *Hancock Truck Lines*, 324 U.S. 774, 776 (1945) (jurisdiction postponed on appeal from order of three-judge court enjoining ICC order). See also Stern & Gressman, *Supreme Court Practice* 237-38 (1969).

summarize their position on the issue while referring the Court to the railroads' earlier reply for a fuller treatment of the question.

Appellees' position that this Court lacks jurisdiction from an appeal of an order of a three-judge court vacating an ICC order is based on a purported distinction between actions to "enjoin" ICC orders and all other actions seeking directly to invalidate such orders. Their contention, however, is inconsistent with the legislative history of the statutes in question; it is contradicted by decades of settled practice in this Court; it is contrary to the views of commentators and to the understanding of Congress; and the same contention was fully briefed and flatly rejected by this Court just a few years ago.

The legislative history of the pertinent statutory provisions buttressed by years of consistent practice in this Court shows that Congress intended from the outset that orders of the ICC would be reviewable by three-judge district courts and that orders of such courts invalidating (or refusing to invalidate) the ICC's orders would be subject to direct appeal to this Court. Furthermore, Congress intended these requirements to apply whenever direct review of ICC orders was sought and without regard to whether the district court's own order was styled as an order "enjoining" the agency's order, setting it aside, or invalidating it in any other equivalent terms.

Since the adoption of the Urgent Deficiencies Act of 1913, orders of the Commission, except those for the payment of money, have been reviewable by three-judge district courts and orders of these courts have

been directly appealable to this Court. That Act provided, in pertinent part:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any orders made or entered by the Interstate Commerce Commission shall be issued or granted . . . unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges. . . . An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case . . . *and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.*" 38 Stat. 220 (emphasis supplied).

Plainly, under this language a suit such as the present one, which resulted in setting aside orders of the ICC, would require a three-judge district court and the district court's order granting or denying relief would be subject to direct review in this Court.

In 1948, as part of the revision of Title 28 and its enactment into positive law (62 Stat. 869), the Urgent Deficiencies Act provisions in pertinent part were codified into Sections 2325 and 1253. The reviser's notes make it patent that there was no intent whatever to alter the meaning, scope and purpose of the prior provisions so far as concerns the three-judge court requirement for review of ICC orders and the provision for direct review in this Court.[5] Since the reviser's

[5] The reviser's note to Section 2325 discloses *inter alia* that it derived from "title 28, U.S.C., 1940 ed., § 47, Oct. 22, 1913, ch. 32, 38 Stat. 220)," which is the Urgent Deficiencies Act, and that

notes are authoritative in the construction of the 1948 revision,[6] the construction here of Sections 2325 and 1253 is governed by the long-standing principle of *United States* v. *Ryder,* 110 U.S. 729, 740 (1884), that "[i]t will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed."

For years, the jurisdiction of this Court in cases such as the present one has been accepted as settled by this Court, by commentators, by Congress and by the ICC itself. See, *e.g., Chicago, M., St. P. & P. R.R.* v. *United States,* 366 U.S. 745, 746 (1961); *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 87 (1957); C. Wright, *Federal Courts* 191 (2d ed. 1970); Burstein, "Judicial Review of ICC Orders," 38 *ICC Pract. J.* 174, 181 (1971). Appellees' suggestion that this represents no more than the casual assumption of several commentators is plainly unpersuasive. Indeed, it appears that this Court only recently determined, in the course of deciding *Electronic Industries Ass'n*

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the provision for direct appeal to the Supreme Court in three-judge cases was located in Sections 1253 and 2101 (which fixes the time for appeal). The reviser's note to Section 1253 states pertinently that "[t]his section consolidates the provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed. relating to direct appeals from decisions of three-judge courts involving orders of the Interstate Commerce Commission or holding State or Federal laws repugnant to the Constitution of the United States." Nothing in the reviser's notes shows any intent whatever to vary the scope of cases involving ICC orders to which the three-judge requirement or direct appeal provisions apply.

[6] *United States* v. *National City Lines,* 337 U.S. 78, 81, 82 (1949); *Stainback* v. *Mo Hock Ke Loc Po,* 336 U.S. 368, 376 n.12 (1949).

v. *United States,* 401 U.S. 967 (1971), that there was no jurisdictional difference between an action to enjoin and an action to set aside an ICC order.[7]

Appellees argue that no direct appeal to this Court lies from the District Court's order invalidating the ICC's orders, and requiring the Commission to undertake proceedings specified by the lower court's detailed mandate, because no "injunction" has been issued. SCRAP-EDF Br. 20-28; ISIS Br. 5-9; NARI Br. 22-24. But the force of this argument depends on establishing the prior proposition that, for purposes of this Court's jurisdiction, the form of the District Court's own order—*i.e.,* whether it is styled as an order enjoining the agency order, setting it aside or invalidating it in any equivalent terms—is determinative. Appellees simply ignore the clear legislative history, the consistent practice of this Court, and the *Electronic Industries* decision—all of which demonstrate that no such distinction exists and that orders invalidating ICC orders are reviewable here however they may be couched.[8]

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[7] While the *Electronic Industries* case was pending, this Court directed the parties to submit supplemental memoranda on two questions which in substance posed the issue whether a suit to enjoin ICC orders is precluded by the availability of a suit to set them aside and, if so, whether the latter suit would have to be tried to a three-judge district court. Citing the legislative history summarized above, all parties to the case submitted memoranda agreeing that there was no pertinent distinction between actions to enjoin and actions to set aside ICC orders and that such actions were in both instances subject to the three-judge court requirement. This Court then unanimously affirmed the District Court's judgment by an eight-to-zero vote, necessarily acknowledging its jurisdiction over the appeal.

[8] Appellees' argument is not unlike an argument which they advanced, and this Court rejected, when appellees sought to avoid

Appellees also argue that at the very least, this Court's jurisdiction on direct appeal is limited to situations in which the lower court's order had "a necessary, coercive impact on what some party could or could not do, *or* was accompanied by the court's granting, or refusing to grant, an order which would have coerced directly some action or inaction of a party." ISIS Br. 7 (emphasis in original); see also SCRAP-EDF Br. 26-27. A short answer to appellees' argument is that the District Court's order has an unmistakable "coercive impact" on the ICC. See pp. 3-4, above. Moreover, none of the cases cited by appellees (ISIS Br. 6-7) to show that "coercion" is the touchstone of Supreme Court jurisdiction even remotely suggested the rationale now proffered by appellees. Finally, this Court has in fact entertained an appeal from the decision of a three-judge district court under 28 U.S.C. § 1253 that itself did no more than determine that certain ICC orders were unreviewable. *Frozen Foods Express* v. *United States*, 351 U.S. 40 (1956).[9]

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review here of the District Court's preliminary injunction issued in June 1973. Because the injunction was captioned "temporary restraining order," appellees argued that this Court had no jurisdiction to review it. *E.g.*, memorandum of SCRAP-EDF in opposition to stay, pp. 2-3. The railroads responded, consistent with the precedents, that the District Court's order was clearly a preliminary injunction (however it might be denominated) because it was issued after a hearing and without the ten day limit applicable to TRO's. This Court not only issued the stay but thereafter accepted jurisdiction and vacated the District Court's order. 414 U.S. 1035 (1973).

[9] Since the ICC orders which the three-judge district court held unreviewable were themselves characterized by this Court as "declaratory," 351 U.S. at 44, this Court thus assumed jurisdiction of an appeal under 28 U.S.C. § 1253 which would determine only whether a three-judge district court's "non-coercive" refusal to review a "non-coercive" ICC order was appropriate.

Appellees rely heavily upon decisions construing the statutory provisions involving injunctions against unconstitutional statutes.[10] Both the legislative development of these latter provisions and the policies underlying them are different from those relating to the review of ICC orders. Whereas the legislative history of the provisions relating to ICC orders shows that they were designed to embrace actions to invalidate ICC orders however the actions might be denominated, the legislative history of the provisions relating to unconstitutional statutes shows that they have always been couched to embrace only actions seeking injunctive relief. *See, e.g.*, 36 Stat. 557; *Kennedy* v. *Mendoza-Martinez, supra*, 372 U.S. at 154-55.

Lastly SCRAP-EDF and NARI suggest that a restrictive interpretation of the direct review statute relating to ICC orders will lighten this Court's caseload. SCRAP-EDF Br. 24; NARI Br. 24. However, even this policy argument has been vitiated by P.L. 93-584, 88 Stat. 1917 (Jan. 2, 1975), which transfers initial jurisdiction over suits to enjoin or suspend ICC orders to the courts of appeals, but which specifically provides that suits already filed shall proceed under "existing" law. The legislative history of the recent amendments shows clearly that Congress understood that under "existing" law decisions of three-judge courts reviewing ICC orders were appealable directly to this Court:

> "Since 1913, with the adoption of the Urgent Deficiencies Act, orders of the Commission—except

[10] *E.g., Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); *Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *Gunn* v. *University Committee to End the War*, 399 U.S. 383 (1970); *Phillips* v. *United States*, 312 U.S. 246 (1941); *Rorick* v. *Board of Comm'rs*, 307 U.S. 208 (1939).

> those calling solely for the payment of money—have been reviewed in the United States district courts by panels of three judges, at least one of whom must be a judge of the court of appeals for the circuit in which the district is located. 28 U.S.C. §§ 2321, 2325. Appeals from three-judge courts lie directly to the Supreme Court as a matter of right." *H. R. Rep.* No. 93-1569, 93rd Cong., 2d Sess. 2 (1974).

See also R.R. Reply 4.[11]

II. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE COMMISSION'S GENERAL REVENUE ORDERS.

In their opening brief, the railroads demonstrated that the long-standing rule establishing the unreviewability of general revenue orders precluded judicial review of the Commission's orders in this case, and that NEPA created no exception to this rule. R.R. Br. 21-30. They further pointed out that despite the even division of this Court over the reviewability of general revenue orders when challenges to such orders were directed at Commission findings of general revenue need applicable to *all rates*,[12] the Court soon thereafter

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[11] Finally, while the clear propriety of review in this Court makes the point academic, it should be noted that appellees would not on any view of the matter be entitled to dismissal of the appeals as they request. SCRAP-EDF Br. 80; ISIS Br. 46; NARI Br. 54. Even if this Court decided that the District Court's order here was not directly appealable to this Court, the usual remedy would be to "vacate the judgment below and remand the case" so that the District Court could enter a new order and afford appellants the opportunity to take a timely appeal to the Court of Appeals. *Mitchell* v. *Donovan, supra,* 398 U.S. at 431-32 & n.4.

[12] *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D. D.C. 1970) and *Atlantic City Elec. Co.* v. *United States,* 306 F. Supp. 338 (S.D.N.Y. 1969), *both aff'd by an equally divided Court,* 400 U.S. 73 (1970).

unanimously affirmed a decision sustaining the dismissal of a suit challenging a general revenue order where the attack was directed not to revenue-need findings but to the application of the general increase to particular categories of rates. *Electronic Industries Ass'n* v. *United States,* 401 U.S. 967 (1971).

The present case is essentially identical to the latter situation. The appellees' claims concern the Commission's treatment of particular categories of rates applicable to recyclable commodities,[18] just as the claims in *Electronic Industries* concerned the Commission's treatment of particular categories of rates applicable to electrical products. *Electronic Industries* therefore is dispositive of this case on the jurisdictional issue, whether or not the Court might otherwise decide to reexamine the general rule followed in the district courts for many years as it was presented in *Atlantic City* and *Alabama Power.* In light of this controlling precedent, it is nothing short of extraordinary that SCRAP-EDF and ISIS fail even to cite the *Electronic Industries* case in their briefs, and that NARI casually lists it in a string of citations it claims are "inapposite." NARI Br. 26.

Appellees likewise fail to consider the underlying reasons for the rule, which include an unwillingness of courts to interfere at what is merely an intermediate stage in the rate-making process, the availability of further remedies focusing upon individual rates, and the dangers of disruption and inconsistency that would result from review of general revenue orders. Indeed,

[18] They do not challenge the conclusions of the Commission with respect to rates on nonrecyclables that went into effect in October 1972. The specific categories of rates of interest to appellees were defined in the tariffs involved. See *Ex Parte No. 281,* 346 I.C.C. 88, 91 (1973).

this very case underscores the soundness of the general rule, for there has been no determination as to the justness or reasonableness of any particular rates on recyclables, and review of the Commission's orders at this juncture would cause the very interference with the administrative process that the rule was designed to avoid.

In the present case, the lower court's intervention, if sustained, would require the Commission to undertake elaborate and time-consuming tasks. As noted above, for example, the lower court would insist upon "an analysis of the effects of the rate structure on investment in manufacturing facilities which can make intensive use of scrap." 371 F. Supp. at 1306 (Gov. J.S. 40a). It would also require "[a] comprehensive study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete." *Id.* (Gov. J.S. 41a). Studies of the scope and detail apparently envisaged by the District Court are extraordinarily complex and have no proper role in a general revenue proceeding, which is in substance designed to provide the railroads with prompt revenue relief, subject to subsequent challenges to individual rates that may be initiated by interested parties.

The impact of such judicial intervention at the general revenue stage not only complicates and delays the administrative process, but it also poses a threat of devastating delays for the railroads in obtaining essential revenue relief. Once this judicial intervention is permitted, an endless succession of studies will routinely be demanded from the Commission in the course of a general revenue proceeding. These demands will in turn inevitably result in substantial delays in desper-

ately needed rate increases.[14] The railroads in this country, faced with immense continuing cost increases in fuel, labor, materials and other cost elements, simply cannot carry the burden of significant additional delays in obtaining rate relief through general revenue cases. Given the existence of individual statutory proceedings in which a just and reasonable rate can be determined, taking account of all appropriate factors including environmental ones, there is no justification for instituting judicial review of general revenue orders.

In arguing for jurisdiction, appellees' briefs misstate the railroads' position and their arguments are, in any event, unpersuasive. SCRAP-EDF and ISIS erroneously contend that the railroads' argument is that a party seeking enforcement of the Commission's duty to prepare an impact statement in a general revenue proceeding "must first seek separate impact statements, rate-by-rate, in administrative reparation proceedings under 49 U.S.C. § 13(1), before he can assert any claim in court." SCRAP-EDF Br. 31. See also ISIS Br. 14. The railroads are not making and have never made such an argument. Rather the railroads have asserted, as is indisputable, that the justness and reasonableness of particular rates on recyclables can only be resolved in individual proceedings, and that it is in these proceedings that environmental determinations respecting recyclables should be reviewed. To the extent that the Commission may rely upon an earlier impact statement in support of its conclusion in a Section 13 proceeding, such a statement

[14] Such delay inescapably results both from district court injunctions, however mistaken—such as the lower court's two earlier injunctions in this case—and from the Commission's inability to complete general revenue proceedings expeditiously because of court-imposed requirements.

would be reviewable so far as it was pertinent. If instead the Commission chose to prepare and rely upon a new impact statement, the earlier statement would be either supplementary or irrelevant depending on the nature of the Commission's undertaking.

ISIS' brief (p. 16) echoes the decision below in arguing that the earlier cases establishing the general rule against reviewability of general revenue orders should not apply in NEPA cases. But the broad language of this Court's *SCRAP* opinion emphasized that nothing in NEPA or its legislative history reflected any congressional intent to alter the rule that the courts may not "suspend" rates by injunction when the Commission has chosen not to do so or when the statutory suspension period has expired. 412 U.S. 694-95. Similarly, nothing in NEPA or its legislative history bespeaks any intention to overturn the settled rule against judicial review either of suspension orders directed to individual rates or of general revenue orders directed to rates as a whole.

ISIS' brief (pp. 11-12) also relies upon the fact that the Government in *Alabama Power* and *Atlantic City* took the position—contrary to settled district court authority—that the revenue need findings in general revenue orders should be directly reviewable.[15] However, the Government's brief in those cases (p. 17) also stated that "the United States agrees with the Commission" that the complaints "do not state a claim for direct judicial review insofar as they challenge

[15] In explaining its position the Government's brief (p. 18) argued in part that such revenue need findings "involve no past or potential consideration of particular commodities" and that the "revenue decision . . . would not be considered further in any potential future proceeding challenging particular rates."

the Commission's preliminary treatment of rates on particular commodities."

Whatever else may be said, it is perfectly plain here that appellees' attacks do focus on particular commodity rates—namely, rates on recyclables—and do not challenge revenue need findings applicable to all rates. Any considerations bearing on the proper level of recyclable rates, including environmental considerations, can be urged in individual complaint proceedings,[16] and only in such proceedings can such rates be definitely fixed. Accordingly, the railroads submit that *Electronic Industries* governs this case and warrants reversal of the lower court's decision on jurisdictional grounds.

III. ON THE MERITS OF THE CASE, THE LOWER COURT ERRED BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE RESPONSIBILE AGENCY.

In their opening brief, the railroads contended that an examination of the Commission's elaborate and detailed impact statement would show that the Commission had given environmental considerations the "hard look" required by NEPA and that, even assuming substantive review of the impact statement was appropriate, the lower court's criticisms were ill-founded and went far beyond the permissible scope of review. R.R. Br. 34-48. The railroads' position represented no more than a particular application of well-settled principles of administrative law predicated on the necessity of

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[16] The Commission's own subsequent decisions both in general revenue cases and in other types of proceedings show that it is fully prepared to reconsider environmental claims directed to recyclables as new cases arise and new information becomes available. See pp. 24-27, below.

achieving a proper allocation of functions between expert agency and reviewing court.

In response, appellees take two different tacks. On the one hand, they attempt to rationalize the District Court's decision which ignored the basic principles of judicial review by engaging virtually in *de novo* consideration of matters entrusted to agency judgment. On the other hand, they seek to insulate the lower court's decision from the scrutiny of this Court on the remarkable ground that the lower court's review of the ICC's impact statement cannot be overturned unless it is found to be "clearly erroneous." Fed. R. Civ. P. 52(a). See SCRAP-EDF Br. 33-64; ISIS Br. 16-44; NARI Br. 26-51.

1. The underlying question which divides the railroads and appellees—and which has caused considerable confusion and uncertainty in the lower federal courts—is the appropriate scope of judicial oversight of an agency's preparation of an environmental impact statement. The railroads have urged that the scope of such review is and should be highly limited, and they have brought to this Court's attention well-reasoned opinions in the lower federal courts which have expressed this view. *E.g., National Helium Corp.* v. *Morton,* 486 F.2d 995 (10th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974); *City of New York* v. *United States,* 344 F. Supp. 929 (E.D.N.Y. 1972) (Friendly, J.).

Appellees have cited other cases adopting varying formulations of the proper scope of review in language appellees apparently find helpful to their cause.[17]

[17] Curiously, the SCRAP-EDF brief (pp. 35, 46, 68) and ISIS brief (pp. 19-20) rely heavily on *National Helium Corp.* v. *Morton, supra,* although that case approved the very standard which

SCRAP-EDF Br. 36-41; ISIS Br. 17-20; NARI Br. 46-47. Yet the SCRAP-EDF brief concedes (p. 45) that " the adequacy or inadequacy of an environmental impact statement is not a legal question that can be decided *in vacuo.*" Whether one characterizes the legitimate role of a reviewing court in passing on an impact statement as assuring that the agency took a "hard look" at environmental factors,[18] that the agency made a "good faith" effort to comply with NEPA's requirements,[19] or that the agency's efforts be considered in light of a "rule of reason,"[20] none of these rubrics should permit a reviewing court in cases involving NEPA to reconsider, revise, and reject the agency's expert evaluation of the evidence before it and its expert judgments. If instead the reviewing court's function is circumscribed by the traditional limitations imposed on judicial review of agency action, then the District Court in this case could not properly invalidate the ICC's impact statement in *Ex Parte No. 281.*

As the railroads showed in detail in their opening brief, the Commission's impact statement represented a prodigious effort and the result was a detailed and carefully considered document. R.R. Br. 9-14. In 150 pages of analysis, the Commission considered each of the related topics specified by the statute. It examined the nature of the railroad rate structure and treated in

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the railroads have urged upon this Court: "an objective good faith effort to comply with the statutory procedural requirements." 486 F.2d at 1001.

[18] *National Resources Defense Council* v. *Morton,* 458 F.2d 827, 838 (D.C. Cir. 1972).

[19] *National Helium Corp.* v. *Morton, supra,* 486 F.2d at 1001.

[20] *Scientists' Institute for Public Information* v. *AEC,* 481 F.2d 1079, 1092 (D.C. Cir. 1973).

depth the question whether freight rate increases would have any effect on the movement of recyclables. Before issuing its final statement, it received and reviewed comments from other federal agencies and the public at large.

Appellees' criticisms of the ICC's efforts, like the lower court's criticisms, represent nothing more than expressions of their substantive disagreement with the ultimate conclusion reached by the Commission. For example, appellees recite at some length the critical comments made of the Commission's draft impact statement by other federal agencies (SCRAP-EDF Br. 49-54; ISIS Br. 26-28; NARI Br. 47-51) and chide the Commission for failing to heed them.[21] But these objections are simply particular substantive arguments that the rate changes will adversely affect the environment or demands for still further studies or analyses. Since the Commission believed that the record amply supported its conclusion that there would be no environmental impact, appellees' complaints are merely another way of saying that the Commission was required to alter the result it reached after a full consideration of the environmental facts and issues before it.

The appellees also complain about the Commission's alleged failure to consider the underlying rate structure based on appellees' claims that recyclable rates were discriminatorily high and that their cumulative impact required consideration. SCRAP-EDF Br. 58-64; ISIS Br. 32-34; NARI Br. 49-50. However, the Commission was entitled to devote principal attention to

[21] It is to be noted that the United States is before this Court supporting the ICC's environmental impact statement, and, of course, represents the combined interests of its agencies.

the particular federal "action" under consideration—namely, the impact (if any) of the particular general increases on recyclables involved in *Ex Parte No. 281*—since this focus is what NEPA's language contemplates. Moreover, the Commission in fact did consider the overall rate structure both in evaluating the cumulative impact of the rate changes here involved and in discussing charges that the rate structure discriminated against recyclables. See R.R. Br. 47-48.

Appellees' criticisms were to be expected in light of the fact, squarely recognized by one court, that it is "doubtful that any agency, however objective, however sincere, however well staffed and however well financed, could come up with a perfect environmental impact statement . . . ." [22] But the validity of an impact statement cannot be made to depend on an agency's ability to anticipate and refute every possible *post hoc* attack that can be leveled at it. If there are to be any sensible limits on the scope of review of impact statements prepared by federal agencies pursuant to NEPA, it is apparent that this Court should reject the lower court's *de novo* consideration of the Commission's extensive and thorough impact statement.

This Court has itself recognized that the "federal agencies . . . have the primary responsibility for the implementation of NEPA." *United States* v. *SCRAP, supra,* 412 U.S. at 694. The lower court's action represents a rejection of that principle; if allowed to stand, it will not only upset the intended division of resposibility between federal agencies and reviewing courts, but it will also be an open invitation to any party dis-

[22] *Environmental Defense Fund* v. *Corps of Engineers,* 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973).

satisfied with the conclusion reached by an agency in an impact statement to litigate his grievance in a federal court. There will be no dearth of litigants able to specify one more study or "comprehensive analysis" that, in their view, constitute a prerequisite to an adequate impact statement. And inevitably, district courts will continuously expand the volume of evidence required in the preparation of impact statements. In light of the Commission's well-reasoned and informed analysis, there is no basis for sanctioning the expansive standard of judicial review urged by appellees and for substituting the lower court's judgment for that of the Commission.

2. Ironically, while SCRAP-EDF and ISIS strenuously urge this Court to take an unjustifiably expansive view of the scope of the lower court's oversight of the Commission's impact statement, in the next breath they seek to immunize the lower court's decision from this Court's scrutiny by making the novel and unwarranted assertion that the lower court's decision can be overturned only if this Court finds it to be "clearly erroneous." SCRAP-EDF Br. 45-48; ISIS Br. 20-23. Appellees' misconception of the scope of this Court's review of the lower court's decision is consistent with their misconception of the scope of the lower court's review of an agency's impact statement: in each instance the appellees proceed from the mistaken premise that a three-judge court reviewing an ICC order is a species of trial court hearing evidence and making independent findings of fact, when in truth it is essentially an appellate tribunal exercising a conventional limited review of agency action.

It is well settled that suits under the Urgent Deficiencies Act to set aside an order of the Commission are

proceedings for judicial review upon the record before the Commission and are not trials *de novo.*[23] It is equally clear that this Court in reviewing such decisions of three-judge courts has accorded their determinations no special deference.[24] Rather, this Court has focused directly on the action of the Commission, often without even mentioning the reasoning or determinations of the three-judge court.[25]

The proceedings in the District Court corresponded to this well-established practice and understanding. No trial was held, no witnesses were heard, and no detailed findings of fact were made.[26] Rather, the District Court simply reviewed a record made before the agency and transmitted to the District Court, and its judgment depended not on evaluating the credibility of witnesses

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[23] *See, e.g., United States* v. *Louisville & Nashville R.R.*, 235 U.S. 314, 320 (1914); *Louisville & Nashville R.R.* v. *United States*, 245 U.S. 463, 466 (1918); *Lang Transp. Corp.* v. *United States*, 75 F. Supp. 915, 922 (S.D. Cal. 1948); *Edwards Motor Transit Co.* v. *United States*, 201 F. Supp. 918, 920-21 (M.D. Pa. 1962). The fact that under the recent amendments to the judicial code such suits are now required to be brought in the courts of appeals underscores the appellate character of the courts' review. See P.L. 93-584, 88 Stat. 1917 (Jan. 2, 1975) reproduced in part in SCRAP-EDF Br. 2a-3a.

[24] *See, e.g., Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 43 U.S.L.W. 4091 (U.S. December 23, 1974); *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409 (1967); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946); *ICC* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

[25] *E.g., ICC* v. *Mechling*, 330 U.S. 567 (1947); *ICC* v. *J-T Transportation Co.*, 368 U.S. 81 (1961).

[26] The affidavits submitted by the railroads were directed against preliminary injunctive relief and were essentially similar in character to the affidavits that are normally filed in courts of appeals or in this Court in connection with an application for stay, or opposition to stay, pending judicial review.

but on reviewing the same agency record and impact statement that is before this Court.[27] It is manifestly unsound to suggest that this Court must accord the District Court's decision the deference accorded to a trial court's finding: any issue that the District Court was entitled to consider is equally open to review in this Court.

3. Scattered throughout the brief of SCRAP-EDF are references to the Commission's environmental impact statements prepared in connection with *Ex Parte Nos. 270* and *295*. They cite these statements to support a variety of arguments such as their assertions that the Commission reached the wrong conclusion in *Ex Parte No. 281* (SCRAP-EDF Br. 9-13), that it should have conducted its preparation of its impact statement in *Ex Parte No. 281* differently (*id.* 57-64), and that, since the Commission has "cured" the defects of its earlier impact statement in its subsequent impact statements, the case may somehow be moot. *Id.* at 19-20, 64, 78. What EDF-SCRAP's brief fails to mention are the critical findings in both the later impact

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[27] While the briefs of SCRAP-EDF (p. 46) and ISIS (p. 21, n.18) point to *Environmental Defense Fund* v. *Corps of Engineers*, 492 F.2d 1123, 1137 (5th Cir. 1974), as supporting their view, that case involved "an extensive trial on the merits" (492 F.2d at 1132) on plaintiffs' motion to enjoin construction of a navigation project, where the trial court, after hearing substantial testimony from live witnesses, made "detailed individual findings." *Id.* Appellees' reliance on such precedents as *United States* v. *United States Gypsum*, 333 U.S. 364, 394 (1948) and *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949) (see SCRAP-EDF Br. 46-48; ISIS Br. 21-22), hardly merits a response. These cases, many of them patent or antitrust actions, involved lengthy trials before federal trial courts which made elaborate findings on the basis of evaluation of the credibility of live witnesses and extensive documentary evidence.

statements that, just as the Commission had concluded in *Ex Parte No. 281,* the environmental impact of increases in rates on recyclables will be "negligible" or "insignificant." *Ex Parte No. 270* (Sub. Nos. 5 and 6), Final Environmental Impact Statement p. i (1974); *Ex Parte No. 295* (Sub. No. 1) Final Environmental Impact Statement p. i (1974).

From the SCRAP-EDF presentation of the conclusions the Commission reached in its later impact statements, a casual reader would never know that the Commission in fact emphatically reaffirmed rather than undermined the conclusions it had reached in *Ex Parte No. 281.* SCRAP-EDF's brief refers only to truncated portions of the Commission's conclusions in its *Ex Parte No. 295* impact statement. For example, the brief makes the following statement, with "supporting evidence," in an attempt to suggest that the described impact was substantial:

> "In the environmental impact statement prepared in *Ex Parte 295,* . . . the Commission estimated that a 3 per cent rail freight increase on goods being shipped for recycling—rather than having no significant environmental impact, as claimed in the Commission's previous boilerplate "findings," and in the *present* impact statement—would mean the following with respect to non-ferrous metals alone:
>
> > "[A]n estimated [additional] 3,097 tons of metal will be annually required from virgin ores. An increased yearly power consumption of 21.8 million kilowatt hours can be expected, with an increase in pollutant emissions of about 15 tons per year." SCRAP-EDF Br. 10-11 (citations omitted).

In context, one gets an entirely different impression of what the Commission said in *Ex parte No. 295:*

> "The principal findings of the study are these:
>
> The proposed 3 percent rate increase will do nothing to stimulate recycling. On the contrary, any perceivable effects will involve some diminution of the rate at which secondary commodities are reclaimed. However, the quantitative effects of a 3 percent rate increase will be very small, in all cases only a fraction of 1 percent of the presently recycled volume of any commodity. *As a result the environmental impacts in terms of increased consumption of resources (including energy) and of pollution, are expected to be insignificant.*
>
> Specifically, in regard to non-ferrous metals the decrease in scrap consumption is expected to be about 2/100 of 1 percent of the present volume, as a result of which an estimated additional 3,097 tons of metal will be annually required from virgin ores. An increased yearly power consumption of 21.8 million kilowatt hours can be expected, with an increase in pollutant emissions of about 15 tons per year." *Ex Parte No. 295* (Sub. No. 1), Final Environmental Impact Statement pp. xiii-xiv (1974) (emphasis added).

This example is characteristic of SCRAP-EDF's use of the Commission's environmental impact statement in *Ex Parte No. 295.*[28]

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[28] The excerpts on pages 10-13 of SCRAP-EDF's brief imply, for example, that raising rail rates on recyclables will cause a substantial decrease in scrap reclamation in general and in recycled iron and steel scrap in particular. In fact, the Commission concluded that in both the short and long term any adverse impact of the increase in freight rates at issue would be insignificant (*Ex Parte No. 295* (Sub. No. 1), Final Environmental Impact Statement 4-1, 4-4 (1974)), and that the decrease in recycled iron and steel scrap amounts to less than two-tenths of one percent. *Id.* at xiv.

It is unnecessary to belabor this point, which is simple and straightforward: SCRAP-EDF's selective reading of the Commission's impact statements in *Ex Parte Nos. 270* and *295* does not accurately represent their actual findings and conclusions. These extensive studies in fact reiterate the basic conclusion which the Commission reached in *Ex Parte No. 281:* that a limited increase in railroad freight rates on recyclables—as part of general rate increases applicable to all commodities including those allegedly in competition with the recyclables—would not significantly affect the quality of the human environment.

CONCLUSION

For the reasons stated above and in the railroads' opening brief, the decision of the lower court should be reversed.

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